

Appl No.: 10/811,644

Atty. Dkt.
PC-1485**REMARKS/ARGUMENTS**

Favorable consideration of this application is respectfully requested. Applicant has rewritten claims 1 and 13, and canceled claim 14. Favorable reconsideration of this application is, consequently, earnestly solicited in view of the following remarks.

Applicant gratefully appreciates the telephone interview with the examiner on November 5, 1008. Applicant agrees with the context of the interview. Applicant has amended both independent claims 1 and 13 to change the preamble from "consisting essentially of" to -- consisting of--. Claim 1 has been further amended to delete the word "approximately", and independent claim 13 has been amended to include features of former dependent claim 14.

Claims 1-3, 13 and 14 were rejected under sec. 103 as being unpatentable over a five reference combination of U.S. Publication '941, U.S. Publication '174, U.S. Patent '948, WO '943 and U.S. Patent '557. Applicant respectfully disagrees with the conclusion the invention is obvious for several reasons.

Applicant notes the office action admits on page 4, states that the "combination of the references does not teach the exact amounts of some ingredients as instantly claimed...." Applicant notes that the novel combination composition set forth in independent claims 1 and 13 has now been amended to include "consisting of", and is thus restricted to the novel composition claimed, and not some other combination. As such, there is clearly no description, teaching, or suggestion in the references for applicants novel combination of ingredients set forth in independent claims 1 and 13, and the novel claimed amounts of ingredients further set forth in independent claim 1.

As applicant noted during the telephone interview, the invention specification on page 8, lines 1-13 sets forth evidence of actual testing results with the novel combination composition which achieved novel treatment results, that cannot be ignored by the Patent Office. Such test data further supports applicants invention as being patentable.

It is clearly improper for the Patent Office to arbitrarily ignore any of the novel features of the subject claims. Under the rules, if the applicant requests the examiner cite the reference(s) showing each and every one of the references that supports a rejection, the examiner must cite the reference or remove the rejection. Applicant again requests

Appl No.: 10/811,644

Atty. Dkt.
PC-1485

the examiner specifically point out which uncited reference(s) describes and teaches these unsubstantiated opinions and assertions raised in the rejection that at least these features are obvious under sec. 103. If actual references are not cited and supplied to the applicant to show these unsubstantiated opinions and assertions mentioned in their rejection, the applicant respectfully requests removal the 103 rejection for at least these reasons alone. Where a reference is relied on to support a rejection, whether or not in a minor capacity, that reference should be positively included in the statement of the rejection. See *In re Hoch*, 428 F.2d 1341, 1342 n.3 166 USPQ 406, 407 n. 3 (CCPA 1970). Thus, to maintain this rejection, the missing references must be cited and a nonfinal office action must be given since applicant has not seen these uncited references.

Applicant disagrees with the rationale cited for attempting to combine the five references of record. The mere fact that someone in the art can rearrange parts of a reference device to meet the terms of a claim is not by itself sufficient to support a finding of obviousness. The prior art must provide a motivation or reason for someone of ordinary skill in the art, without the benefit of the inventor's specification to make the necessary changes in the reference device. *Ex parte Chicago Rawhide Mfg. Co.*, 223 USPQ 351, 353 (Bd. Pat. App. & Inter. 1984).

There is no teaching, nor suggestion for modifying the references of record to include all the novel features of the amended claims. Under well recognized rules of the MPEP (for example, section 706.02(j)), the teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *In re Vaack*, 947 F.2d 488, 20 USPQ2d 1438(Fed. Cir. 1991).

There is no suggestion to combine the five references of record as advanced by the Examiner, except from using Applicant's invention as a template through a hindsight reconstruction of Applicants claims, and a factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of argument reliant upon ex post reasoning. *Ex Parte Crawford et al*, Appeal 20062429, Decided May 30, 2007." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1397.

Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational

Appl No.: 10/811,644

Atty. Dkt.
PC-1485

underpinning to support the legal conclusion of obviousness." *In re Kahn*, 441 F. 3d 977, 988 (CA Fed. 2006). *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d at 1397.

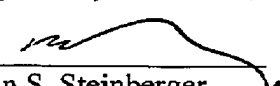
Clearly, the combination of the five references mentioned in the sec. 103 rejection results in substantially different composition combinations of ingredients that would be different from the compositions set forth in amended claims 1 and 13, which is now restricted to "consisting of". Additionally, the removal of the term "approximately" from independent claim 1 also eliminates the "broadens the scope" reference that also results in the amounts of the ingredients being limited to amounts NOT described, taught or suggested by the prior art.

Thus, for at least these reasons, removal of this rejection is respectfully requested, and a notice of allowance is respectfully requested.

Applicant contends the references cannot be modified to incorporate the features of subject claims 1-3 and 13 without utilizing Applicant's disclosure. As noted above, such hindsight reconstruction is not acceptable to reject the subject claims.

In view of the foregoing considerations, it is respectfully urged that claims 1-3 and 13 be allowed. Such action is respectfully requested. If the Examiner believes that an interview would be helpful, the Examiner is requested to contact the attorney at the below listed number.

Respectfully Submitted;


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